Supreme Court, U.S.
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No. 08-910

IN THE

SUPREME COURT OF THE UNITED STATES

GENE A. TYRRELL – PETITIONER

vs.

UNITED STATES OF AMERICA – RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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2B1.1 (a) (1)

Rules:

S.Ct. Rule 1

Respondent appears to argue the following points in opposition to Petitioner's claims:

1. Petitioner cannot raise his *SANTOS* claim because it was not raised in the lower courts. (Opposition Brief at 5).

2. There is no way to determine what this Court really said in *SANTOS* because there was no "common denominator or 'narrowest grounds' that represents the Court's holding." (Opposition Brief at 7, quoting *NICHOLS v UNITED STATES*, 128 L.Ed.2d 745, 753 (1994), which made the remark in the context of there being some "Courts of Appeals [which] have decided this).

3. If *SANTOS* applied in the instant case at all, it would only apply to "essential expenses", not "normal expenses" of operating the alleged illegal business. (Opposition Brief at 9).

ARGUMENT

1. The Petitioner is not barred from raising the application of a new Supreme Court substantive statutory holding.

Petitioner was precluded from raising this issue in the lower court because prior to this Court's decision in *SANTOS*, the Eleventh Circuit clearly held that money laundering (as charged against Petitioner) was legal. In *UNITED STATES v MARTINELLI* 454 F.3d 1300, 1318 (11th Cir. 2006), the court said "[I]n cases where, when a business as a whole is illegitimate, even individual expenditures that are not intrinsically unlawful can support a promotion money laundering charge". It would have been futile for the Petitioner to have raised this issue.

When dealing with an attempt to raise a substantive statutory holding after a petitioner had used his one bite of the apple in § 2255, the court in *WOFFORD v SCOTT*, 177 F.3d 1236, 1244 (11th Cir. 1999), said that where "circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal, or first § 2255 motion", it could even be raised in a § 2241 petition.

In *CONNOR v FINCH* 431 U.S. 407, 421 n.19[9b], this court said that it "has the authority and the

duty in exceptional circumstances to notice federal court errors to which no exception has been taken, when they seriously affect the fairness, integrity or reputation of public judicial proceedings".

In *DAVIS v UNITED STATES*, 417 U.S. 333, 346, this Court said:

> "[If...Davis' conviction and punishment are for an act that the law does not make criminal...; [t]here can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances..." (Internal quote marks and brackets deleted)

For all the above reasons, the Petitioner should not be procedurally barred from raising this claim notwithstanding; a miscarriage of justice would result.

2. Irrespective of the "fractured" opinion of the Court in *UNITED STATES v SANTOS*, there were common grounds accepted by at least five Justices of this Court.

In the plurality opinion, Justice Scalia said that "proceeds" means "profits" when there is no legislative history to the contrary." (*SANTOS*, 170 L.Ed.2d 912, 926), while Justice Stevens, on the other hand, said that this was not his view, that it was "the purest of dicta". (*Id.* at 929, n.7)

Whereas there exists this difference, it is important to note that Justice Stevens said,

> "my conclusion rests on my conviction that Congress could not have intended the perverse result that the dissent's rule would produce if its definition of 'proceeds' where applied to an unlicensed gambling business. In other application of the statute **not involving such a perverse result**, I would presume that the legislative history summarized by Justice Alito reflects the intent of Congress." *Ibid.* (Emphasis added)

Hence, it appears that it is the "perverse result" which dictates those instances where "proceeds" means "profits". In those situations, Justice Stevens supports the Plurality opinion that "proceeds" means "profits". Hence, it is necessary to examine the result of the addition of money laundering charges to the mail fraud alleged, (which "Congress...had duly considered and appropriately punished elsewhere in the Criminal Code") (*Id.* at 922), in order to see whether Justice Stevens' concurrence leads to the "profits" definition in the instant case.

Petitioner was charged with mail fraud in violation of 18 USCS § 1341. The loss attributable to him was set by the jury in the amount of $2.5 million. The U.S.S.G. §2B1.1(a)(1) sets the Base Offense Level (BOL) at 7, plus the enhancement for the dollar amount of $2.5 million or less at 16, for a total of 23.

with a BOL range in Criminal History Category I of 46 to 57 months. Yet, due to the addition of money laundering, Petitioner received a 136 month sentence. In this light, Petitioner's sentence was as much as three times what the mail fraud on its own would justify, certainly this falls within the definition of "perverse result", and Justice Stevens agreed in that case, "proceeds" means "profits".

Additionally, all nine Justices agreed that there was a merger problem. (*SANTOS* 170 L.Ed.2d at 922) (Plurality opinion); at 928 (Justice Stevens' concurring opinion); at 929 (Justice Breyer's dissenting opinion); and at 940-941 (dissenting opinion of Justice Alito). However, Justice Alito suggests a way of dealing with it under the "advisory" nature of the Guidelines after Booker, but Justice Stevens correctly points out that this wouldn't help *Santos*.

Moreover, there is the question as to whether a word can mean two different things in its application under the same statute. Justice Stevens said yes. (Id. At 926-928), however, eight Justices disagreed. Id. At 925 (Plurality opinion); see also, Id. 941 ("The meaning of the term 'proceeds' cannot vary from one money laundering case to the next"), (dissenting opinion of Justice Alito).

Lower courts all over the country have taken different positions on this question. Some say that "the narrow holding in *SANTOS* is that 'proceeds' means "profits" where the specified unlawful activity

(SUA) is the operation of an illegal gambling business". (*UNITED STATES v PRINCE*, 2008 WL 4861296 (W.D.Tenn. Nov. 7, 2008)). In *UNITED STATES v FLEMING*, 2008 WL 3824752 (3rd Cir. August 15, 2008), that court said that *Santos* had no effect on the definition of "proceeds" where the SUA is drug sales. In *KENNEMORE v UNITED STATES*, 2008 WL 4965948 (E.D.Tex., November 17, 2008), that court said that *SANTOS* did not hold that financial transactions conducted with receipts from embezzlement is a nonexistent offense".

However, it appears that far more courts have held otherwise. One of the best reasoned opinions Petitioner has seen is that of *UNITED STATES v HEDLUND*, 2008 WL 4183958 (N.D. Cal. September 9, 2008) (D. Lowell Jensen, Senior District Judge):

> "Justice Stevens finds that..." I cannot agree with the plurality that the rule of lenity must apply to the definition of 'proceeds' for [sale of contraband and crime syndicates]. (*Id.*, [128 S.Ct.] at 2032 n.3. It seems clear to this Court that the contraband sales of type of SUA described by Justice Stevens would include all offenses related to drug trafficking, including the marijuana cultivation offense defendant pleaded guilty to...
>
> "There is a good deal of discussion in *SANTOS* about a 'merger problem' *Id.* at 2026-27. The problem is the fact that it is often the case that the same underlying conduct can constitute an offense under both the

substantive SUA involved and the money laundering statute. *Id.* (*HEDLUND*, page 2,
"1. Legislative History and headnote 2 under "merger").

On page 3 of the WL record, under "3. Stare Decisis," the court states:

> "Justice Scalia undertakes to describe the stare decisis effect of Justice Stevens' opinion as limiting the holding to the judgment entered on the narrow ground that 'proceeds' means 'profits' when there is no legislative history to the contrary. *SANTOS*, 128 S.Ct. at 2031 (plurality opinion). Justice Stevens says, "that is not correct". *Id.* at 2034 n.7 (Stevens, J. concurring). Justice Stevens describes the grounds of his decision as including the lack of legislative history, **and** his conclusion that **Congress could not have intended the 'perverse' result caused by the 'merger problem' that is produced by Justice Alito's opinion**. *Id.* (Emphasis added) He concludes that when both circumstances [the merger problem and perverse results] are considered, the rule of lenity may have weight; that the plurality opinion is persuasive; and that he concurs in the judgment. *Id.*"

In *HEDLUND*, Supra, the Honorable D. Lowell Jensen, a 22-year veteran in that court concluded that the word "proceeds" can't mean different things

in different applications of the same statute. At page 4 of the opinion in *HEDLUND*, the court continues:

> "Justice Scalia...describes Justice Stevens' position as 'original with him', as an 'interpretative contortion', and that 'it has no precedent in our cases'. *Id.* [at 2034] Justice Scalia points out that just three years ago the Supreme Court held in *Clark v Martinez*, that 'the meaning of words in a statute **cannot** change with the statute's application'. *Id.*" (Emphasis added)

In his conclusion in *HEDLUND*, Judge Jensen said after weighing all the various potential reaches of the *Santos* decision:

> "The result of this analysis is that the Court believes that the Supreme Court in *SANTOS* has held that the word 'proceeds' in 18 U.S.C. § 1956 (a)(1)(A)(i) means 'profits' and that *Clark v Martinez*, requires that this result **must apply to every SUA listed in the statute**. The further result is that the money laundering conviction of defendant must be set aside". (Id., page 5 of 2008 WL 4183958) (All emphasis added)

However, the Respondent believes that, "contrary to petitioner's suggestion (Pet. 4), *SANTOS* did not hold that 'proceeds' universally means 'profits' in Section 1956." (See Opposition Brief at 6)

(Emphasis added) The Respondent's position is erroneous.

More and more federal courts are in line with this finding. In the *UNITED STATES v YUSUF*, 529 F3d 172, 183 (3rd Cir. 2009), that court held that the Santos decision effectively overturned their decision in *UNITED STATES v GRASSO*, 381 F.3d 160, 167 (3rd Cir. 2004). The *GRASSO* decision was based on money laundering in a mail fraud case as was the case in *YUSUF*.

Just a few weeks ago, the Seventh Circuit (where *Santos* originated) in *UNITED STATES v LEE*, 558 F3d 638 (7th Cir. 2009), the court applied the "profits" definition to money laundering in a case involving a prostitution scheme where the SUA was a violation of 18 U.S.C. § 371 and 1952(a), vacating the Lees' convictions in counts alleging a violation of 18 U.S.C. § 1956(a) (1).

In *UNITED STATES v BAKER*, 2008 WL 4054998 (E.D.Mich. August 27, 2008), that court held that the Government was wrong to conclude that *SANTOS* only applies to illegal gambling lotteries.

In *UNITED STATES v SHELBURNE*, 563 F. Supp.2d 601, 607 (W.D.Va.2008), that court held that it "disagreed with the governments narrow construction of *SANTOS*." That court held that payments for rent and equipment were not from profits; (see also *UNITED STATES v POULSEN*,

568 F.Supp.2d 885, 913-914 (S.D.Ohio.2008) (The court was applying *SANTOS* in a fraud case).

3. There is no meaningful distinction between "normal" expenses and "essential" expenses in this Court's decision in *SANTOS*.

The Respondent has drawn a distinction between these two words due to Justice Stevens' use of the term in his concurring opinion. For the same reasons set forth above, Petitioner avers that this does absolutely nothing to dilute the salient parts of this Court's decision in *SANTOS*.

The Santos Court's position rather seems to be that if one is charged with using "proceeds" to pay expenses, "his illegal activity cannot possibly violate the money laundering statute, because by definition profits consists of what remains after expenses are paid". (*SANTOS*, 170 L.Ed.2d at 922) (Plurality opinion)

CONCLUSION

It appears obvious that the lower courts need some kind of direction from this Court in order to resolve the conflicts between them on the application of *SANTOS*. Rule 1 of this Court focuses on resolving conflicts. Petitioner respectfully prays that the Court will grant him the relief requesting in his Petition while resolving these conflicts.

Respectfully submitted,

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